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No. 08-576

Supreme Court, U.S.
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In The
Supreme Court of the United States

FIN-AG, INC.,

Petitioner,

v.

PIPESTONE LIVESTOCK AUCTION MARKET, INC.; SOUTH DAKOTA LIVESTOCK SALES OF WATERTOWN, INC.; WATERTOWN LIVESTOCK AUCTION, INC.; and CIMPL'S, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of South Dakota

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Under the Uniform Commercial Code (UCC), buyers in the ordinary course of business purchased goods free and clear of a security interest under UCC § 9-307. This provision, however, did not apply to purchasers of farm products. This was often referred to as the "farm products exception" and led to the unfair result that purchasers of farm products had to pay for farm products twice when the lender had a security interest in the farm product sold and the purchaser did not provide a jointly payable instrument to the debtor and secured party.

In an effort to alleviate this inequitable result, Congress enacted the Food Securities Act (FSA), 7 U.S.C. § 1631 (1985). Congress noted that the "farm products exception" forced innocent buyers of farm products to become unwilling loan guarantors for lenders that were making the profit from the loan. Congress therefore alleviated these concerns by removing the "farm products exception" from UCC § 9-307, and by shifting the burden of loss from buyers and commission merchants to the lenders who financed the farm operations. Since 1985, the FSA has preempted the UCC "farm products exception" and the FSA provides that a buyer of farm products is subject to a security interest only if the secured party complies with the notice requirements in the Act through an appropriate Effective Financing Statement.

COUNTER-STATEMENT OF QUESTION PRESENTED – Continued

Against this backdrop, the question presented is:

Whether a purchaser of farm products is required to pay twice for farm products when the lender knows its debtor is using a d/b/a to sell farm products, but fails to disclose the d/b/a of its debtor on the Effective Financing Statement as required by law and that debtor then uses that d/b/a name to sell farm products.

RULE 29.6 DISCLOSURE STATEMENT

Pipestone Livestock Auction Market, Inc. has no parent or publicly held company owning 10% or more of its corporate stock. South Dakota Livestock Sales of Watertown, Inc. has no parent or publicly held company owning 10% or more of its corporate stock. Watertown Livestock Auction, Inc. has no parent or publicly held company owning 10% or more of its corporate stock. Cimpl's, Inc. has no parent or publicly held company owning 10% or more of its corporate stock.

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INTRODUCTION

The Petition presents no sound basis for this Court to exercise jurisdiction. Petitioner claims that the Court should grant review to resolve a claimed conflict in the interpretation of the FSA between the South Dakota Supreme Court and the Minnesota Supreme Court. In reality, however, there is no such conflict. The Petitioner simply fails to inform the Court that if Petitioner had complied with South Dakota law by disclosing its debtors' d/b/a on the Effective Financing Statement ("EFS"), this issue would never arise under the FSA. In fact, the South Dakota Administrative Rules require the lender to list the debtor's d/b/a designation. Although Petitioner had actual knowledge that its debtors were doing business as C&M Dairy, it did not list C&M Dairy on the EFS, and it now bears the risk of loss.

The EFS in a central filing state, such as South Dakota, provides the necessary information for the purchaser of farm products[1] to obtain the identity of a debtor subjecting a farm product to a security interest. When a lender files its EFS with the South Dakota Secretary of State, the information from the EFS is placed in the central registry and a master list

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[1] The FSA refers to purchasers in its Title and Findings. 7 U.S.C. § 1631(a). However, the Act protects both commission merchants, commonly referred to as sale barns, and buyers in the ordinary course of business, such as Cimpl's, Inc. 7 U.S.C. § 1631(g) and 7 U.S.C. § 1631(d). Reference herein is to purchasers, but includes both buyers and commission merchants.

is created. Purchasers of farm products may review this master list to determine whether the specific seller's farm product is subject to a security interest. If the seller is on the list and there is a security interest in the specific farm product being sold, the purchaser simply provides a jointly payable instrument to the seller and the secured party.[2] All parties are protected. The system has worked for years and continues to work effectively. The lender simply needs to provide adequate notice of known sellers subjecting farm products to the lender's security interest through its EFS.

Unlike the typical sale of farm products, these actions arose out of a situation where the lender, out of its own neglect, failed to properly fill out and file an adequate EFS by failing to disclose a d/b/a name used by its debtors. In fact, Petitioner fails to inform the Court that it knew its debtors were using the d/b/a "C&M Dairy" to sell their cattle. Despite this knowledge, Petitioner did not list C&M Dairy as a party subject to Petitioner's security interest in the EFS and made no effort to amend its EFS. What Petitioner leaves out of its Petition is that its own neglect led to the situation where Respondents did not know that C&M Dairy's cattle were subject to Petitioner's security interest after Respondents

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[2] There may be other accommodations reached between the lender, its debtor, and the purchaser other than a jointly payable instrument that do not warrant further discussion for purposes of this Brief.

dutifully checked their purchased master list. Because Petitioner failed to comply with the law and provided an incomplete (and therefore ineffective) EFS, Petitioner now bears the risk of loss, as Congress intended. There is no reason for the Court to grant the Petition when the claimed reason for review of Federal law ultimately boils down to a lender's error that could have been easily remedied by identifying a known d/b/a, such as "C&M Dairy," on the EFS.

OPINIONS BELOW

The South Dakota Supreme Court decisions are *Fin-Ag, Inc. v. Cimpl's, Inc.*, 754 N.W.2d 1 (S.D. 2008); *Fin-Ag, Inc. v. Pipestone Livestock Auction Agency, Inc. and South Dakota Livestock Sales of Watertown, Inc.*, 754 N.W.2d 29 (S.D. 2008); and *Fin-Ag, Inc. v. Watertown Livestock Auction, Inc.*, 754 N.W.2d 23 (S.D. 2008). The decisions are referenced in the Petitioner's Appendix and citation to the South Dakota Supreme Court opinions is to the specific page of the Petitioner's Appendix (P.A).

The opinion of the Minnesota Supreme Court in *Fin-Ag, Inc. v. Hufnagle, Inc.*, 720 N.W.2d 579 (Minn. 2006) is also contained in the Petitioner's Appendix and citation is to the specific page in the Appendix.

COUNTER-STATEMENT OF THE CASE

On June 27, 2002, Petitioner entered into an Agricultural Security Agreement (ASA) with the listed debtors: Berwald Brothers, Calvin Berwald, Michael Berwald, Kimberly Berwald and Sokota Dairy, LLC (debtors). (*Fin-Ag, Inc. v. Cimpl's, Inc.*, P.A-2). Petitioner later filed an EFS with the South Dakota Secretary of State[3] on July 2, 2002. (*Id.* at P.A-3). The EFS included milk and cattle as farm products subject to Petitioner's security interest. *Id.* The debtors were largely involved in a dairy operation, which necessarily involves milk and the dairy cattle that produce the milk.

As early as July 2002, the month Petitioner filed its EFS, Petitioner should have been aware its debtors were using C&M Dairy in cattle transactions. (*Id.* at P.A-6). In July 2002, one of Petitioner's debtors, Calvin Berwald, issued a request for disbursement of funds to Petitioner for payment of the purchase of cattle. *Id.* The request for disbursement attached a yard receipt[4] showing that the debtors wanted to be

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[3] According to the rules promulgated by the U.S. Department of Agriculture, the system operator for establishing and maintaining the master list is the local Secretary of State or other agency designated by the State. 9 C.F.R. § 205.1(e); 9 C.F.R. § 205.201; 9 C.F.R. § 205.203. There is no issue raised by Petitioner that South Dakota has improperly utilized its Secretary of State's office for its central filing system.

[4] A yard receipt is a sale barn document used to identify the purchaser of a set of cattle from a sale barn. Here, it is a yard

(Continued on following page)

reimbursed for a purchase they made through C-M Dairy. Petitioner then disbursed funds for this order of cattle requested by "C-M Dairy." *Id.* In October 2002, Petitioner became undeniably aware that its debtors were doing business under the name C&M Dairy when Petitioner, through its current law firm requesting this Writ, judicially admitted that: "Berwalds, d/b/a C&M Dairy owned and operated a dairy operation in Toronto, South Dakota." (*Id.* at P.A-5). The lawsuit specifically referenced attached documents showing C&M Dairy as a seller of cattle. (*Id.* at P.A-6).

With this knowledge and admission, Petitioner still chose not to amend its EFS to give notice to purchasers that C&M Dairy, a known seller, was subject to its security interest in its debtors' cattle. This is contrary to the law promulgated under the FSA, which establishes a workable scheme to deal with this situation.

Specifically, the Petitioner failed to abide by the clear mandate of both South Dakota and Federal law when it failed to list C&M Dairy on its EFS. South Dakota law clearly requires that the d/b/a "C&M Dairy" be listed on the EFS as an additional debtor. (*Id.* at P.A-19-20). "The South Dakota Administrative Rules implementing the FSA central filing system provide that the 'use of doing business as is

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receipt from Respondent, Watertown Livestock Auction, Inc., showing the purchase of a set of cattle by C-M Dairy.

considered an additional debtor and shall be listed as such with the elimination of the doing business as.'" *Id.* This is not only the law, but Petitioner was provided clear direction to list a d/b/a in the South Dakota Secretary of State's instructional forms for filling out an EFS. (*Id.* at P.A-20).

Further, South Dakota law that requires disclosure of the debtors' known d/b/a was in compliance with the FSA and the Department of Agriculture's Regulations promulgated under the FSA. The master list may include debtors doing business under a different name. 7 U.S.C. § 1631(c)(2)(C)(ii)(I). The local Secretary of State has the discretion to require additional information in the EFS. 9 C.F.R. § 205.103(b).

The Petitioner, in an attempt to overcome its own error in not disclosing "C&M Dairy" on the EFS, argued at the South Dakota Supreme Court level that C&M Dairy was a "nonexistent entity." The South Dakota Supreme Court clarified that the legal status of C&M Dairy, or any other d/b/a, was in reality irrelevant because the applicable rules required the d/b/a to be listed on the EFS. (*Fin-Ag, Inc. v. Cimpl's, Inc.*, *supra*, P.A-19). To the extent Petitioner now claims this creates confusion in the industry, Petitioner is simply incorrect. The underlying South Dakota Supreme Court decisions further clarify that South Dakota lenders must list a d/b/a on the EFS and, if the lender fails to do so, the risk of loss falls on the lender under the FSA.

Having failed to list the d/b/a "C&M Dairy" on the EFS, Petitioner could not invoke the protection of the FSA under 7 U.S.C. § 1631(e)(3). (*Id.* at P.A-22). This led to Petitioner's argument at the South Dakota Supreme Court that the security interest was not "created by the seller," relying on 7 U.S.C. § 1631(d), which provides in relevant part:

> (d) Purchases free of security interest
>
> Except as provided in subsection (e) of this section and notwithstanding any other provision of Federal, State, or local law, a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations shall take free of a security interest created by the seller, even though the security interest is perfected; and the buyer knows of the existence of such interest.

7 U.S.C. § 1631(d). In short, Petitioner requested the South Dakota Supreme Court to disregard the purpose of the FSA and conclude that the d/b/a seller, C&M Dairy, did not create the security interest and therefore purchasers of the cattle from C&M Dairy could not take free of its security interest even if the purchasers did not have notice through the master list.

In considering this argument, the South Dakota Supreme Court exhaustively examined the Minnesota Supreme Court decision of *Fin-Ag, Inc. v. Hufnagle, Inc.*, 720 N.W.2d 579 (Minn. 2006). (*Fin-Ag, Inc. v. Cimpl's, Inc., supra*, P.A-22). The *Hufnagle* decision

involved a "fronting" situation where a farmer used his hired help and minor children to sell grain subject to a security interest. (*Hufnagle, supra,* P.A-120). Contrary to Petitioner's argument that the *Hufnagle* decision is virtually identical on the facts, the factual events were different. As the South Dakota Supreme Court recognized:

> Unlike *Hufnagle,* Berwalds created the security interest, but did not transfer the collateral to a distinct, real person for a later sale. They utilized their d.b.a. to sell the cattle themselves. Therefore, for purposes of the created by the seller limitation, Berwalds cannot be separated from the acts of their d.b.a. C & M.

(*Fin-Ag, Inc. v. Cimpl's, Inc., supra*, P.A-23). Moreover, the South Dakota Supreme Court observed this unique scenario, caused by the lender's own neglect, was not addressed in *Hufnagle*:

> The Minnesota court acknowledged that it did not know the actual relationship between the owner and fronting parties, and the court assumed three potential scenarios. The fronting party was: (1) an agent selling on behalf of the owner as an undisclosed principal; (2) a commission merchant or selling agent; or (3) the owner of the farm product who was selling on his/her own behalf. *Id.* Although the court ultimately concluded that these three types of fronting persons could not be sellers of the debtor's property and simultaneous creators of the debtor's

> security interest, the *Hufnagle* court conceded its conclusion was based on the "factual scenarios possible *on this record*. . . ." *Id.* *Hufnagle* did not, however, consider the fourth factual scenario that is before this Court, i.e., debtors who created the security interest, and conducted their business under their d.b.a. business name.

Id. Finally, the South Dakota Supreme Court further distinguished *Hufnagle,* on the facts, because, unlike the innocent purchasers here who had dutifully checked the master list and did not locate C&M Dairy, the purchasers in *Hufnagle* appeared to be participants in the scheme. The South Dakota Supreme Court observed:

> *Hufnagle* is further distinguished because it appeared to involve collusion on the part of the buyer. *Fin Ag, Inc. v. Hufnagle, Inc.,* 700 N.W.2d 510, 518 (Minn.Ct.App. 2005). Although the Minnesota Supreme Court did not specifically rely on this fact, it did not reject the Minnesota Court of Appeal's analysis noting the extensive previous sales relationship between the owner of the cattle and the buyer, and the familial and employment relationships of the supposed "sellers" to the actual owner. *Id.* One such relationship involved sales by and proceeds checks payable to the owner's children, one of whom was only five years old at the time of the sale. *Id.* Thus, *Hufnagle* involved a buyer that apparently knew of the lien and appeared to be a participant in the scheme to defraud the

> creditor. In this case, Fin-Ag concedes there was no collusion, and Cimpl's neither knew of the lien nor was a participant in the scheme to defraud Fin-Ag.

(*Id.* at P.A-24). The facts considered in *Hufnagle* were different. There was no d/b/a considered and there was apparent collusion by the purchasers in *Hufnagle*. Unlike the situation in *Hufnagle*, the central issue here is that a d/b/a must be identified on the EFS, which was not done due to Petitioner's error.

The South Dakota Supreme Court, faced with Petitioner's argument that the security interest was not "created by the seller," distinguished *Hufnagle* and rejected the argument. Under the specific circumstances here, involving a debtor who creates a security interest in collateral and then later uses a d/b/a known by the lender to sell loan collateral, the Court instead concluded the burden of loss should rest with the lender. The South Dakota Supreme Court observed:

> In light of this express intent, for purposes of the notice exception, it is unreasonable to conclude that Congress intended to require a buyer like Cimpl's to determine the legal status of C&M Dairy or be subjected to constructive notice that Berwalds were legally the sellers. Cimpl's simply had no duty, other than to check the master list, to determine whether C&M Dairy was a seller on Fin-Ag's EFS. Likewise, with respect to the created by the seller limitation, we believe it is unreasonable to conclude Congress intended that

> buyers, acting in the ordinary course of business, would not be protected by the FSA from debtors who created a security interest in collateral and subsequently utilized their business d.b.a. in selling the collateral.

(*Id.* at P.A-27). Clearly, the Petitioner's failure to supply the appropriate d/b/a on the EFS created a situation where the loss properly fell on the lender. The situation in *Hufnagle* involved separate individuals as sellers and a collusive purchaser.

Petitioner also incorrectly suggests that Iowa law may be in conflict with the South Dakota Supreme Court's decision. Petitioner cites the decision of *Agriliance, LLC v. Runnells Grain Elevator, Inc.*, 272 F.Supp. 2d 800 (S.D. Iowa 2003). The *Agriliance* decision simply considered a conversion action under Iowa law. The quoted portion of the *Agriliance* decision at Footnote 7 in the Petition is contained within the *Agriliance* Court's discussion of whether Runnells exercised wrongful control over the crops so as to constitute conversion under the Iowa Supreme Court authority of *Kendall/Hunt Publ'g Co. v. Rowe*, 424 N.W.2d 235, 247 (Iowa 1988). In fact, immediately preceding the language quoted by Petitioner, the *Agriliance* Court references the *Rowe* conversion elements and the *Agriliance* Court was specifically addressing whether Runnells possessed the wrongful intent to convert the 2001 crops.

This Court's careful review will show that the *Agriliance* Court concluded, under Iowa law, that

Agriliance had established the elements for conversion under Iowa law. The issue as to whether Runnells received a notice meeting the requirements of the Food Security Act was a non-issue in *Agriliance*. The *Agriliance* Court recognized "it is also undisputed that Agriliance held a perfected security interest in the Mitchell's 2001 crops and that Runnells received a notice meeting the requirements of the Food Security Act." (*Id.* at 806). This lone district court decision interpreting Iowa law of conversion is not in conflict. *Agriliance* is readily distinguishable from the decisions here. In *Agriliance*, the defendant Grain Elevator received a proper FSA notice and knew that the 2001 crops of the consignor were covered. Runnells Grain Elevator also knew that the crops were in fact subject to the security interest.

REASON FOR DENYING THE PETITION

This case does not present a conflict in interpretation of an important federal question and there is no sound basis for this Court to review this case. Supreme Court Rule 10(b). Petitioner's assertion that the respective Minnesota Decision and the South Dakota Decisions are in direct conflict and only this Court can clarify the interpretation of the FSA is simply incorrect. The South Dakota Supreme Court's interpretation of the FSA changed nothing in the FSA and merely requires the lender to be diligent as the party bearing the risk of loss. In fact, where a lender

in the central filing state of South Dakota identifies the debtor's d/b/a as required by law, that lender will receive protection under the FSA. The lender that does not identify the debtor's d/b/a, as the case is here, will not and should not receive protection under the FSA. In the situation where the debtor transfers the farm product to a distinct real person for sale with a collusive purchaser, the reasoning in *Hufnagle* is invoked and the lender is again protected by the FSA. The only time the lender is not protected under the FSA is when the lender neglects to fill in the d/b/a on the EFS, as required, and its debtor sells farm products through the use of the d/b/a.

Ironically, Petitioner claims that the South Dakota Supreme Court decisions create a roadmap for a dishonest debtor to bypass the law. Petitioner would rather argue the hypothetical situation that a debtor may create a false d/b/a because it does not want to face the reality that it simply failed to list a known d/b/a on the EFS. The simple reality is that the lender in the present case already has knowledge of the d/b/a and must file that information with the South Dakota Secretary of State to be protected by the FSA.

Moreover, even if we were dealing with unscrupulous debtors, the South Dakota Supreme Court decisions do not make it easier for said unscrupulous debtors to avoid a security interest. Instead, the decisions determine who should bear the risk of loss when the secured party fails to list the known d/b/a.

Again, Petitioner would argue that lenders will be unpaid in hypothetical scenarios. That is not the situation here. Petitioner will be fully repaid by the debtors through the bankruptcy repayment plan. (*Fin-Ag, Inc. v. Cimpl's, Inc.*, *supra*, P.A-3-4). In reality, it makes no sense here to place the risk of loss on innocent buyers and commission merchants who are limited in what they can do to prevent this conduct when Federal law makes it clear that their only responsibility is to check the master list.

Further, the FSA provides the lender with the authority to control this problem by drafting security agreements that limit the sale of farm products to certain listed purchasers and the FSA provides for severe punishment if the debtor violates the agreement. The FSA provides:

> (h) Security agreements; identity lists; notice of identity or accounting for proceeds; violations
>
> (1) A security agreement in which a person engaged in farming operations creates a security interest in a farm product may require the person to furnish to the secured party a list of the buyers, commission merchants, and selling agents to or through whom the person engaged in farming operations may sell such farm product.

> (2) If a security agreement contains a provision described in paragraph (1) and such person engaged in farming operations sells the farm product collateral to a buyer or through a commission merchant or selling agent not included on such list, the person engaged in farming operations shall be subject to paragraph (3) unless the person –
>
> (A) has notified the secured party in writing of the identity of the buyer, commission merchants, or selling agent at least 7 days prior to such sale; or
>
> (B) has accounted to the secured party for the proceeds of such sale not later than 10 days after such sale.
>
> (3) A person violating paragraph (2) shall be fined $5,000 or 15 per centum of the value or benefit received for such farm product described in the security agreement, whichever is greater.

7 U.S.C. § 1631(h). A lender can certainly protect itself under the FSA and through prudent banking practices by investigating the status of its loan collateral and maintaining current information.

This is further supported by the FSA itself and the Department of Agriculture's Regulations. 7 U.S.C. § 1631(c)(4)(D) provides that the EFS "must be amended in writing, within three months, similarly signed, authorized, or otherwise authenticated by the debtor and filed, to reflect material changes." *Id.*

Further, "a material change" is defined in the Department of Agriculture's regulations as: "whatever change would render the master list entry no longer informative as to what is subject to the security interest in question." 9 C.F.R. § 205.209(a). Clearly the burden is on the lender to exercise proper banking practices and update its EFS when there is a material change. The lender must act prudently, police its loan and update information because it bears the risk of loss and has the closest relationship to the debtor.

CONCLUSION

There is no sound reason to grant this Petition, which ultimately involves a lender's clerical error that is easily remedied. There is no true conflict between the South Dakota Supreme Court's interpretation of the FSA and the Minnesota Supreme Court's interpretation of the FSA. The decisions considered different facts and are distinguishable. Therefore,

Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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